

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.834 of 2015
and M.P.No.1 of 2015

Kaliyamurthy .. Appellant/Plaintiff

Vs.

Venkateswaran .. Respondent/Defendant

Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 14.08.2014 made in A.S.No.5 of 2013 on the file of III Additional District and Sessions Court, Cuddalore at Vridhachalam, reversing the judgment and decree dated 30.08.2011 made in O.S.No.67 of 2004 on the file of the Principal Sub Judge, Vridhachalam.

For Appellant : Mr.R.Rajarajan for Mr.T.Gandhi

For Respondent : Mr.T.Murugamanickam Senior Counsel
for Mr.D.Balachandran

JUDGMENT

The Second Appeal is filed against the judgment and decree dated 14.08.2014 made in A.S.No.5 of 2013 on the file of III Additional District and Sessions Court, Cuddalore at Vridhachalam, reversing the judgment and decree dated 30.08.2011 made in O.S.No.67 of 2004 on the file of the Principal Sub Court, Vridhachalam.

2.The appellant, who succeeded in the trial Court, but lost in the First Appellate Court, has come forward with this Second Appeal. The appellant is plaintiff and respondent is defendant in O.S.No.67 of 2004 on the file of the Principal Sub Court, Vridhachalam. The appellant filed said suit for specific performance of contract of sale agreement dated 06.03.2002 to sell the suit property and to decide the mesne profit under Order XX Rule 12 C.P.C. and alternative relief of refund of Rs.1,50,000/- paid by the appellant as advance. The case of the appellant is that the respondent is owner of the suit property. The respondent offered to sell the suit property for a total sale consideration of Rs.2,10,000/-. The appellant and respondent entered into an agreement of sale dated 06.03.2002 and on that date, the appellant has paid RS.1,50,000/- as advance and respondent received the same. It

was agreed that the appellant would pay the balance sale consideration of Rs.70,000/- on or before 06.03.2004 and get the sale deed executed in his favour. As per the said agreement, the appellant demanded the respondent personally and also through other persons to execute the sale deed, but the respondent did not come forward to execute the sale deed and he denied the agreement of sale. The respondent committed breach of contract. The appellant issued notice dated 20.02.2004 through his advocate calling upon the respondent to come to Sub-Registrar Office on 01.03.2004 to receive balance sale consideration of Rs.60,000/- and execute the sale deed. The appellant was waiting at the Sub-Registrar Office, Thittakudi, to pay balance sale consideration of Rs.60,000/- and respondent did not come to the Sub-Registrar Office. The respondent has sent reply dated 11.03.2004 making false averments stating that the respondent borrowed Rs.1,50,000/-, appellant asked the respondent to execute the mortgage deed, took the respondent to Sub-Registrar Office, compelled him to execute the sale agreement and respondent executed sale agreement. The value of the property is more than Rs.5,00,000/- on the date of sale agreement. Hence, the appellant filed the suit for the reliefs stated above.

3.The respondent filed written statement and denied all the averments made in the plaint and contended that the respondent did not agree to sell the suit property. According to the respondent, agreement of sale is forged one. The question of breach of contract does not arise. There is no necessity for the respondent to sell the suit property for Rs.2,10,000/-.

3(i).The respondent filed additional written statement on 31.07.2007. After reiterating the averments made in the earlier written statement, the respondent further contended that the appellant is professional money lender and he lends money at the rate of interest of Rs.2.50 for Rs.100/- and in default, huge interest is received by the appellant. The appellant compelled the respondent to execute the deed in favour of one Mani Udaiyar for Rs.4,50,000/- and another deed in favour of the appellant for Rs.3,40,000/- on condition that the said amounts are to be paid within two years and cancelled the sale agreement. The appellant is having original agreement and respondent is having xerox copy of the same.

3(ii).The respondent filed additional written statement on 16.02.2010 and contended that the appellant was not ready and willing to fulfil his obligation in the agreement of sale. He is not entitled to specific performance both legally and factually. No cause of action has arisen for filing of the suit and appellant has not come to the Court with clean hands.

3(iii).The respondent filed another additional written statement on 10.08.2010 contending that the suit is barred by limitation. The value of the property is more than

Rs.5,00,000/-. The Court has no pecuniary jurisdiction.

4.The appellant filed two reply statements on 17.08.2009 and 08.03.2010 denying the averments made by the respondent in the additional written statements. The appellant amended the plaint by including alternative relief of refund of advance amount of Rs.1,50,000/- together with interest @ 12% per annum and for damages.

5.Based on the above pleadings, the learned trial Judge framed necessary issues. Before the learned trial Judge, appellant examined himself as P.W.1 and one Pachamuthu was examined as P.W.2 and marked four documents as Exs.A1 to A4. The respondent examined himself as D.W.1 and he did not mark any document.

6.The learned trial Judge considering the pleadings, oral and documentary evidence and judgments relied on by the parties, decreed the suit and granted decree of specific performance holding that the respondent agreed to sell the suit property to the appellant and Ex.A2/sale agreement is not security document for the loan transaction.

7.Against the said judgment and decree dated 30.08.2011 made in O.S.No.67 of 2004 on the file of the Principal Sub Court, Vridhachalam, the respondent has filed A.S.No.5 of 2013 on the file of III Additional District and Sessions Court, Cuddalore at Vridhachalam.

8.The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge independently considering the materials available on record, judgment of the Trial Court and arguments of counsel for the parties, allowed the First Appeal setting aside the decree of specific performance and granted decree for refund of Rs.1,50,000/- together with interest at 9% per annum from the date of sale agreement till realisation holding that the appellant was not ready and willing to perform his part of contract.

9.Against the said judgment and decree dated 14.08.2014 made in A.S.No.5 of 2013 on the file of III Additional District and Sessions Court, Cuddalore at Vridhachalam, reversing the judgment and decree dated 30.08.2011 made in O.S.No.67 of 2004 on the file of the Principal Sub Court, Vridhachalam, the present Second Appeal is filed by the appellant/plaintiff.

10.At the time of admission, the following substantial questions of law were framed:

"1.Whether the Lower Appellate Court is correct in dismissing the suit by holding that the appellant/plaintiff is not ready and willing, when the readiness and willingness is

admitted by the respondent/defendant in his cross-examination and also not disputed in his written statements?

2. Is not the Lower Appellate Court wrong in reversing the decree and judgment of the Trial Court on the ground that the appellant/plaintiff is not ready and willing when the ground of readiness and willingness was not raised in first appeal?"

11. The learned counsel for the appellant contended that the First Appellate Court erred in holding that the appellant was not ready and willing to perform his part of contract. The appellant issued Ex.A3 notice dated 20.02.2004 expressing his willingness to perform his part of contract and called upon the respondent to be present in the Sub-Registrar Office on 01.03.2004 to receive balance sale consideration and execute the sale deed in his favour. The appellant was waiting in the Sub-Registrar Office, Thittakudi, from 10.00 a.m. to 3.00 p.m., but respondent did not come to the Sub-Registrar Office. The respondent in his cross-examination admitted this fact. The respondent never disputed the capacity of the appellant to pay the balance sale consideration within the time limit mentioned in the agreement of sale. The respondent never disputed that the appellant was not ready and willing to perform his part of contract. The respondent did not raise this issue in the grounds of First Appeal. In addition to the above contention, the learned counsel for the appellant contended that with regard to genuineness of Ex.A2 agreement of sale, appellant has examined P.W.2, who is one of the attesting witnesses of Ex.A2, to prove that the said agreement is only security document for the loan transaction. In support of his contention, he has relied on the following judgments:

(i) (2000) 6 SCC 420 (Motilal Jain v. Ramdasi Devi (Smt) and others;

"6. The first ground which the High Court took note of is the delay in filing the suit. It may be apt to bear in mind the following aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property:

(i) Delay running beyond the period prescribed under the Limitation Act;

(ii) Delay in cases where though the suit is within the period of limitation, yet :

(a) due to delay the third parties have acquired rights in the subject-matter of suit;

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief.

Here none of the above mentioned aspects applies. That apart factually also, the High Court proceeded on an incorrect assumption with regard to cause of action. Ext.2 was executed on

February 20, 1977 and under it the sale deed was to be executed on or before July 19, 1977. The last notice was issued on November 26, 1978 and from that date the suit was filed only after nine months and not after more than a year as noted by the High Court. Therefore on the facts of this case the ground of delay cannot be invoked to deny relief to the plaintiff.

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9. That decision was relied upon by a three Judges Bench of this Court in Syed Dastagirs case, wherein it was held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed, "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form."

It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale."

(ii) (2008) 4 SCC 212 (Ramakrishna Pillai and another v. Muhammed Kunju and others);

"10. There can be no quarrel with the position in law urged by learned counsel for the respondent about the parameters to be considered while dealing with a suit for specific performance. But the High Court's judgment is clearly vulnerable. Firstly, there was no dispute ever raised by the defendants about the readiness and willingness of the plaintiffs to fulfill their obligations. The High Court was clearly in error in holding that no plea regarding readiness and willingness was raised. As noted above, the trial court in its judgment has referred to various portions of the averments in the plaint where the plaintiffs had categorically stated that they were and are always willing to fulfill their part of the obligations. The High Court also failed to notice that there was no plea either in the written statement or in the cross-objections filed in the appeal before the High Court that the plaintiffs were not ready and willing to fulfill their part of the obligation."

(iii) 2003 AIR (Madras) 305 (M. Ramalingam, deceased by legal heirs v. V. Subramanyam deceased by legal heirs);

"9. As stated above, the plaintiff seeking the relief of specific performance has rested his case on Ex.A1 agreement for sale dated 22.5.1978. The said Ex.A1 is a registered agreement for sale in respect of the plaint Schedule mentioned immovable property, wherein the sale consideration was fixed at Rs. 40,000/-. Ex.A1 document also further contains a recital that a sum of Rs. 35,000/- was paid by the plaintiff to the defendant, and the balance of consideration was only Rs. 5,000/-, and the sale transaction should be completed within a period of six months therefrom. It remains to be stated that all the terms and the recitals in the said document by themselves were very clear and unambiguous, and it does not require any further construction of the terms or recitals therein. The defendant in his written statement has well admitted not only the execution of Ex.A1 agreement, but also the receipt of Rs. 35,000/- as found under the agreement. The plaintiff in his evidence as P.W.1 has categorically narrated the events, which preceded the agreement viz. the part payment of consideration and the execution of Ex.A1 agreement. It is pertinent to point out that Ex.A1 agreement was also registered. Though the plaintiff was cross

examined in length, not even one circumstance was brought forth to disbelieve or discredit the evidence of the plaintiff. In view of the admission of the execution of the said document along with the receipt of Rs. 35,000/- by the defendant coupled with the evidence of P.W.1 and also the clear and unambiguous terms and recitals found therein, the Court is of the considered view that no more proof could be expected to prove the document."

(iv) 2010 (8) MLJ 1050 (P.Thulasimani v. K.G.Chandran);

"32. In view of the submissions made by the learned counsels appearing on behalf of the parties concerned and on a perusal of the records available, it is seen that the appellant has not shown sufficient cause or reason for this Court to interfere with the concurrent findings of the Courts below. The claim made by the appellant that the sale agreement, dated 21.6.2002, marked as Ex.A-1, had been entered into pursuant to the money transaction between the appellant and the respondent cannot be accepted. There is no evidence adduced on behalf of the appellant to sustain such a claim. Further, both the Courts below had found, based on evidence, that the claim of the appellant that he had executed the sale agreement in favour of the respondent, pursuant to the money transaction, which had taken place between the appellant and one K.Palanivel, cannot be accepted. The appellant has not been in a position to show the reason for not cancelling the sale agreement, dated 21.6.2002, even though it has been stated that he had discharged the liability in respect of the money said to have been borrowed from K.Palanivel."

12. Per contra, the learned Senior Counsel appearing for the respondent contended that it is only loan transaction and sale agreement is only for the security purpose. The respondent stated in para-2 of the additional written statement that in fact, the appellant was never ready and willing to fulfil his obligation in the agreement and as such he is not entitled to relief of specific performance of contract both legally and factually. Having made this denial, issues were framed by the trial Court as to whether the agreement of sale is security for the loan agreement and readiness and willingness arises. He further contended that none of the grounds in the Second Appeal come under the provisions of Order XLI Rule 2 C.P.C., wherein it is stated that the Appellate Court while deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal. The First Appellate Court after

considering all the materials on record held that appellant was not ready and willing to perform his part of contract and the reasoning is valid and prayed for dismissal of the Second Appeal.

13. Heard the learned counsel for the appellant as well as respondent and perused the materials available on record.

14. Substantial questions of law (1) and (2):

The appellant originally filed suit for specific performance of agreement of sale dated 06.03.2002. Subsequently, he amended the plaint and included alternative relief of refund of advance amount of Rs.1,50,000/- together with interest @ 12% per annum. Both the Courts below rejected the contention of the respondent that agreement of sale dated 06.03.2002 marked as Ex.A2 is only security document for the loan transaction and finding of the Courts below are based on facts. The various contentions of the learned counsel for the appellant with regard to genuineness of the agreement of sale are not relevant to the two substantial questions of law raised in the Second Appeal.

15. The trial Court held that the appellant is entitled to decree of specific performance. The First Appellate Court reversed the said decree on the ground that the appellant was not ready and willing to perform his part of contract. There is no error in the said finding of the First Appellate Court for the following reasons:

(i) Appellant admitted that he has only sought two years time to complete the sale transaction, as he did not have balance sale consideration of Rs.60,000/-;

(ii) The appellant admitted in his cross-examination that his first son was studying B.E. and second son was studying M.B.A., therefore, he did not have money with him to pay the balance sale consideration;

(iii) The appellant in the plaint and evidence stated that he has demanded the respondent personally, also through other persons, called upon the respondent to receive balance sale consideration and to execute the sale deed. The appellant has not stated as to when he offered to pay balance sale consideration and get sale deed executed in his favour and when the respondent denied the same.

(iv) The appellant has issued notice only on 20.02.2004 within the time limit for complete the sale transaction, which was about to expire.

16. According to the learned counsel for the appellant, he was waiting in the Sub-Registrar Office, Thittakudi, to pay the balance sale consideration to the respondent and get the sale deed executed, but he has not produced any document to substantiate this contention. The learned counsel for the appellant admitted in his cross-examination that he is having money for the stamp duty payable for the sale deed and registration charges. The appellant has not stated that as to when his sons who were studying colleges completed their

studies and when he was ready to pay the balance sale consideration. The appellant in his cross-examination admitted that he did not know the value of the property, when he entered into agreement of sale. The trial Court failed to appreciate these facts properly. On the other hand, the First Appellate Court extracting relevant portions of the appellant's cross-examination and appreciating the above facts in proper perspective, held that the appellant was not ready and willing to perform his part of contract. The learned First Appellate Judge relied on the judgment of this Court reported in 2013 (7) MLJ 688 Madras (P.Jaswat Kumar vs. M.Rajasekar), wherein this Court held that a purchaser should not wait till the fag end of completion of sale transaction and should not take advantage of extended period of limitation as per Limitation Act. The said decision is squarely applicable to the facts of the present case. In the present case, both the substantial questions of law are answered against the appellant and finding of the First Appellate Court in respect of alternative relief as prayed for by the appellant is confirmed. The judgments relied on by the learned counsel for appellant do not advance the case of appellant in view of facts of present case.

17.In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal Subordinate Judge, Vridhachalam.
- 2.III Additional District and Sessions Court
Cuddalore at Vridhachalam.
- 3.The Section Officer,
VR Section, High Court, Madras.

+2cc to Mr.D.Balachandran, Advocate SR.NO.49008
+1cc to Mr.T.Gandhi, Advocate SR.NO.49159

SR. (Co)
sm:28.8.2018

S.A.No.834 of 2015
and M.P.No.1 of 2015